

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

**BERKEL & COMPANY
CONTRACTORS, INC.,**

Plaintiff,

vs.

**CIVIL ACTION
No. 03-2201-GTV**

**AMEC CONSTRUCTION
MANAGEMENT, INC.,**

Defendant.

MEMORANDUM AND ORDER

Plaintiff, Berkel & Company Contractors, Inc., filed suit in state court, alleging that Defendant, AMEC Construction Management, Inc., breached a construction subcontract. Defendant removed the case pursuant to 28 U.S.C. § 1441, claiming that this court has original diversity subject matter jurisdiction under 28 U.S.C. § 1332. Defendant then moved to dismiss the case for lack of personal jurisdiction or transfer venue (Doc. 4). Plaintiff filed a motion for extension of time to respond to Defendant's motion (Doc. 10) and a motion to remand (Doc. 11). The court granted Plaintiff's motion for extension of time, giving Plaintiff twenty days after resolution of the motion to remand to respond to Defendant's motion to dismiss or transfer venue.

Plaintiff's motion to remand is now ripe for review. Plaintiff claims that Defendant's petition for removal was untimely and asks the court to remand the action to the District Court of Wyandotte County, Kansas. For the following reasons, the court grants Plaintiff's motion to remand (Doc. 11).

I. Standards for Removal and Remand

“When a plaintiff files in state court a civil action over which the federal courts would have original jurisdiction based on diversity of citizenship, the defendant . . . may remove the action to federal court. . . .” Caterpillar Inc. v. Lewis, 519 U.S. 61, 68 (1996) (citing 28 U.S.C. § 1441(a)). As the party invoking the federal court’s jurisdiction, the defendant carries the burden of demonstrating that the requirements for exercising jurisdiction are present. Martin v. Franklin Capital Corp., 251 F.3d 1284, 1290 (10th Cir. 2001) (citation omitted). “Because the courts of the United States are courts of limited jurisdiction, there is a presumption against federal jurisdiction.” Frederick & Warinner v. Lundgren, 962 F. Supp. 1580, 1582 (D. Kan. 1997) (citing Basso v. Utah Power & Light Co., 495 F.2d 906, 909 (10th Cir. 1974)).

The defendant removing the case must follow a statutory procedure outlined in 28 U.S.C. § 1446. Section (b) provides a deadline for filing a notice of removal in a civil action:

The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based.

“Although the 30-day time requirement for removal is mandatory it is not jurisdictional.” Farm & City Ins. Co. v. Johnson, 190 F. Supp. 2d 1231, 1236 (D. Kan. 2002) (citing Grubbs v. Gen. Elec. Credit Corp., 405 U.S. 699, 702 (1972)); McShares, Inc. v. Barry, 979 F. Supp. 1338, 1342 (D. Kan. 1997) (citations omitted). ““The failure to comply with these express statutory requirements for removal can fairly be said to render the removal ‘defective’ and justify a remand.”” Huffman v. Saul Holdings Ltd. P’ship, 194 F.3d 1072, 1077 (10th Cir. 1999) (quoting

Snapper, Inc. v. Redan, 171 F.3d 1249, 1253 (11th Cir. 1999)); McShares, Inc., 979 F. Supp. at 1341-42. Courts should narrowly construe the removal statutes and resolve doubts in favor of remand. Thurkill v. Menninger Clinic, Inc., 72 F. Supp. 2d 1232, 1234 (D. Kan. 1999) (citations omitted); Cohen v. Hoard, 696 F. Supp. 564, 565 (D. Kan. 1988) (citations omitted). A court does, however, have the power to retain a case untimely removed. Farm & City Ins. Co., 190 F. Supp. 2d at 1236 (citing Loftin v. Rush, 767 F.2d 800, 805 (11th Cir. 1985)). Moreover, if a plaintiff fails to object to noncompliance with the statutory removal procedures within thirty days, any right to object is waived, providing it does not raise a jurisdictional issue. Green Tree Fin. Corp. v. Arndt, 72 F. Supp. 2d 1278, 1284 (D. Kan. 1999) (citing Charles Alan Wright, et al., Federal Practice & Procedure § 3739, at 454 (3d ed. 1998) (“After the expiration of the thirty-day period following the filing of the removal notice, the right to object to nonjurisdictional defects in the removal process is considered waived.)).

II. Discussion

The parties do not dispute that Defendant’s petition for removal was not filed within thirty days of receipt of Plaintiff’s initial pleading. Defendant was served with Plaintiff’s Petition on March 3, 2003. On March 21, 2003, Defendant’s counsel asked Plaintiff’s counsel for an extension of time to answer or respond to the Petition. Plaintiff’s counsel agreed. On April 18, 2003, Defendant filed a “Memorandum Advising Court of Parties’ Agreement to Extend Defendant’s Deadline to File its Responsive Pleading to Plaintiff’s Petition and Motion for Extension of Time” with the state court. The Memorandum stated, “Counsel for Plaintiff has agreed to extend the deadline for Defendant to file its Answer or other responsive pleading to

April 23, 2003.” On April 23, 2003, Defendant filed and served its notice of removal.

Defendant makes two arguments why the court should ignore the missed deadline for notice of removal: (1) Before considering whether removal was proper, the court should determine whether it has personal jurisdiction over Defendant; and (2) Defendant’s notice of removal was timely or, if it was not, Plaintiff waived the thirty-day limit on removal. The court finds Defendant’s arguments unpersuasive.

A. Determination of Personal Jurisdiction before Remand

Defendant cites Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574 (1999), and Asociacion Nacional de Pescadores a Pequena Escal O Artesanales de Colombia v. Dow Quimica de Colombia S.A., 988 F.2d 559 (5th Cir. 1993), abrogated by Marathon Oil Co. v. Ruhrgas, 145 F.3d 211 (5th Cir. 1998), rev’d, 526 U.S. 573, for its position that the court should first consider whether it has personal jurisdiction over Defendant. Ruhrgas held that where “a district court has before it a straightforward personal jurisdiction issue presenting no complex question of state law, and the alleged defect in subject-matter jurisdiction raises a difficult and novel question, the court does not abuse its discretion by turning to personal jurisdiction.” 526 U.S. at 588. In Asociacion, the Fifth Circuit held that the case should have been remanded to state court because the amount in controversy requirement had not been met. 988 F.2d at 566. Nevertheless, the court addressed whether personal jurisdiction existed. Id. at 566-67.

The court finds both of these cases distinguishable. They do not address removal procedural defects and do not suggest that the court should forgive Defendant’s failure to file a notice of removal within the time provided by statute. The removal procedural requirements are

strictly construed and enforced. Boyles v. Junction City Foundry, Inc., 992 F. Supp. 1246, 1248 (D. Kan. 1997) (citations omitted); Henderson v. Holmes, 920 F. Supp. 1184, 1188 (D. Kan. 1996) (citations omitted). The court will enforce them in this case.

The court also rejects Defendant's argument that it should address the personal jurisdiction question first because a federal court is more suited to address the question than a state court. Furthermore, if the question is as straightforward as Defendant suggests, the interests of judicial economy will not be frustrated by a remand to state court.

B. Timely Removal or Waiver

Defendant alternatively argues that either the notice of removal was timely or that Plaintiff waived the thirty-day limit by agreeing to an extension of time to answer or respond to Plaintiff's Petition. The court rejects these arguments as well.

Defendant first argues that its removal was timely because the extension of time to answer or respond served as an extension of time to remove. This argument has been rejected repeatedly by courts, including the Tenth Circuit. See, e.g., Oldland v. Gray, 179 F.2d 408, 411 (10th Cir. 1950); Lee v. Martin, No. 02-1720, 2002 WL 1613708, at *1 (E.D. La. July 18, 2002); Reliance Ins. Co. v. Van Liew Capital, Inc., No. 00-0471, 2000 WL 224101, at *1 (S.D.N.Y. Feb. 28, 2000); Bertrand v. Vingan, 899 F. Supp. 1198, 1199 (S.D.N.Y. 1995) (compiling cases). In Oldland v. Gray, the Tenth Circuit stated, "[T]he majority and we think the best reasoned view, is to the effect that an extension of time to plead by an order of court beyond a date when the pleadings would be due under a statute of the state or general rules of practice of the state courts, does not extend the time for applying for removal under Section 72, Title 28 U.S.C.A." 179 F.2d at 411 (rendering

decision based on 1940 version of 28 U.S.C. § 1446, which was amended in 1949).

While acknowledging that courts have rejected the “extension to answer equals extension to remove” argument, Defendant contends that Plaintiff waived the right to object to a late notice of removal. The court disagrees. Defendant did not specifically ask for an extension of time to remove the case, and the court declines to assume that Plaintiff contemplated that the extension of time also applied to removal, particularly because Oldland is the law of this Circuit.

C. Attorney Fees and Costs

Plaintiff asks the court to award it costs and fees because Defendant wrongfully removed the case. 28 U.S.C. § 1447(c) gives the court authority to require a defendant to pay costs and expenses, including attorney fees, incurred as a result of a wrongfully removed case. Because Defendant raised an arguable question regarding whether its removal was proper, the court declines to award costs and attorney fees. See Hoover, 205 F. Supp. 2d at 1241 (citing Amundson & Assocs. Art Studio, Ltd. v. Nat’l Council on Comp. Ins., Inc., 977 F. Supp. 1116, 1127 (D. Kan. 1997)).

IT IS, THEREFORE, BY THE COURT ORDERED that Plaintiff’s motion to remand (Doc. 11) is granted. Defendant’s motion to dismiss (Doc. 4) should be addressed by the state court.

The case is closed.

Copies or notice of this order shall be transmitted to counsel of record.

IT IS SO ORDERED.

Dated at Kansas City, Kansas, this 18th day of June 2003.

s/ G. Thomas VanBebber
G. Thomas VanBebber
United States Senior District Judge